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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

JAMES B. CRISMON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals, Eighth Circuit

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To the United States Court of Appeals, Eighth Circuit

James B. Crismon, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above-entitled cause on March 20, 1972.

OPINIONS BELOW

This cause was decided by the United States Court of Appeals for the Eighth Circuit on March 20, 1972. Pursuant to Rule 14, Rules of the United States Court of

Appeals for the Eighth Circuit, the judgment of conviction entered in the trial court was affirmed without opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 20, 1972. See Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Rule 19. 1. (b) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether the admission of testimony, both irrelevant and immaterial to the issues, in the cause at bar constituted a departure from the accepted and usual course of judicial proceedings such as to call for an exercise of the Supreme Court's power of supervision.

STATEMENT

Petitioner was indicted by the Federal Grand Jury in five counts for violations of Section 656, Title 18, United States Code; in two counts for violations of Section 1005, Title 18, United States Code; in one count for a violation of Section 1341, Title 18, United States Code.

A trial upon the issues resulted in Petitioner being found guilty upon each of the eight counts for which he had been indicted; and, thereafter, Petitioner was sentenced to imprisonment for five years on each count, with the sentence imposed under Count II, to run consecutively with the sentence imposed under Count I, and the remaining six counts to run concurrently with Count I and Count II, for a total of ten years, and Petitioner was fined $5,000.00 under Count VIII of the Indictment.

During the trial, Respondent called to the stand as a witness June Saltz, whose testimony is reproduced as Appendix B. The substance of the witness's testimony was that, prior to August of 1970, she had been Petitioner's mistress and that in August of 1970, she and Petitioner took a trip to Texas, California and Mexico. The alleged purpose of introducing such testimony was to establish the element of flight. The testimony was admitted over Petitioner's objections.

REASONS FOR GRANTING THE WRIT

An examination of the statement heretofore set forth in this Petition will reveal that Petitioner was charged by the United States of America for the offenses of misapplication of funds by bank officer or employee, the offense of fraudulent and false statements, and the offense of mail fraud. An examination of Appendix B will demonstrate that the testimony of Respondent's witness Saltz in no way spoke to the issues that would surround the charges of misapplication of funds by bank officer or employee, fraudulent and false statements or mail fraud. The essence of her testimony was that she had maintained a meretricious relationship with Petitioner and that in the month of August, 1970, when the bank of which Petitioner was President was being examined by the State of Missouri bank examining authorities, witness Saltz and Petitioner went for a trip to Texas, California and Mexico, taking with them the sum of $50,000.00 cash. The alleged purpose of the introduction of such testimony, as stated by the United States District Attorney, was to show flight. An examination of the transcript shows that there was no flight to avoid prosecution, as the concept of flight in the law is understood. At no time was evidence introduced which would show that Petitioner fled from the prosecuting authorities, and, in fact, there was evidence

to introduce to show that Petitioner produced himself when informed that charges were being lodged against him. The District Attorney knew what the testimony of witness Saltz would be, as indicated by his summation found in Appendix B.

In view of the gap between the charges and the nature of the testimony of witness Saltz, admitted by the lower court and sanctioned by the Court of Appeals in its affirmance of the lower court's decision, Petitioner submits that the testimony itself was such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The testimony that the witness was a mistress of the Petitioner and the further testimony concerning the trip to Texas, California and Mexico, were all irrelevant and immaterial facts to the charges brought against Petitioner, yet such information would obviously be prejudicial in the eyes of the jury.

CONCLUSION

Therefore, it is respectfully submitted that this Petition for Writ of Certiorari should be sustained.

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 71-1493

United States of America, Plaintiff-Appellee, v. James B. Crismon, Defendant-Appellant.	Appeal from the United States District Court, Eastern District of Missouri, Eastern Division.

Order

The judgment of conviction as to each count is affirmed. See Rule 14, Rules of the United States Court of Appeals for the Eighth Circuit.

By the Court

Date: March 20, 1972.

APPENDIX B

[717] **JUNE SALTZ,**
being produced, sworn and examined on behalf of the Government, testified as follows:

Direct Examination

By Mr. Heineman

Q. Would you state your name, please? A. June Saltz.

Q. Where do you reside, Mrs. Saltz? A. Shirley Basin, Wyoming.

Q. What is your occupation? A. Housewife.

Q. Do you know the Defendant, James B. Crismon? A. Yes, sir.

Q. How long have you known him? A. A little over three years.

Q. What was your relationship, if any, with the Defendant, Mrs. Saltz?

Mr. Shaw: Would you step up just a second?

Witness: His mistress.

Mr. Shaw: I'm going to ask that the Jury be admonished to disregard that and a mistrial declared.

(Whereupon, the following proceedings were had at the Bench, in the presence, but out of the hearing of the Jury:)

The Court: What is the purpose of this?

[718] Mr. Heineman: To show flight.

The Court: Flight?

Mr. Heineman: Flight by the Defendant, yes. To show intent.

The Court: When did he flee?

Mr. Heineman: He flew August the 9th, 1970, Your Honor.

Mr. Shaw: He wasn't indicted until November, and we made bond here in September.

Judge, he turned himself in to the FBI. Mr. Williams knows that.

The Court: The return here is received the within warrant on the 20th day of November by arresting the suspect on November 23rd, 1970. Took him before the United States Commissioner, who set his bond.

Mr. Shaw: That's the second indictment. See, there was a two-count—here, let me explain this entire affair.

He was first of all arrested; a warrant was issued by a Sheriff by the Magistrate in St. Francois County. He surrendered at that very time a two count indictment had been returned—or was it a two count information?

The Court: Two count indictment was filed.

Mr. Shaw: Or something that came out of Taylor's [719] office here. Now, that was in September, the first week in September, and he came up here and made bond on that. Then we appeared in Harper's court. Webster hadn't taken over yet. And the two count indictment was issued and set for trial. Then that was dismissed and this nine count indictment came out. That's why you have the November dates on that.

The original indictment was in September, but he had come back here voluntarily and made bond on the State offense, and then when he came back here on that, the other warrant was issued. Hell, nobody had to go arrest him. He wasn't picked up anywhere else.

The Court: What would this witness testify to, Mr. Heineman?

Mr. Heineman: Your Honor, the testimony of this witness would be that on August the 9th—August the 8th, 1970, that Mr. Crismon called her and told her to pack up because she and he were leaving on a trip. She would then say that the next day they came by and picked her up and they told her—they got about a block from the house and that Mr. Crismon told her at that time did you bring all your clothes, and she said no. And he said well, you should have because we may not come back. I've got plenty of money to take care of us. I brought $50,000.00.

Mr. Shaw: Judge, he came back and nobody had to [720] go apprehend him.

(Whereupon, the following proceedings were had in the presence and in the hearing of the Jury:)

The Court: Members of the Jury, we will have a temporary recess. Go back to your deliberating room.

(Whereupon, there was a recess, after which the Jury returned to the Courtroom and the following proceedings were had and entered of record:)

The Court: The objection heretofore made is overruled. Request for mistrial is denied.

Q. (Mr. Heineman) Mrs. Saltz, I direct your attention to Saturday, August the 8th, 1970, and ask if you had any conversation with the Defendant on that date? A. Yes, sir.

Q. And what, if anything, did the Defendant tell you? A. He told me that we were going away on a vacation and for me to get ready.

Q. Okay. Was there anything else that he told you that day? A. He told me—I asked him where are we going, and he said Mexico. He said he was depressed, he was tired of people not approving what he done for them, and

he was under [721] so much pressure and he just had to get away a while and think.

Q. Did he make any mention of the Bank Examiners?

Mr. Shaw: Oh, Judge——

Witness: No, sir.

Mr. Shaw: Just a moment.

The Court: Okay.

Mr. Shaw: Withdraw the objection.

The Court: I thought you would.

Mr. Shaw: I'm glad to have heard that.

Q. (Mr. Heineman) Did you have any more conversation with him that day? A. No, sir.

Q. Did you have occasion to see him the next day, on Sunday? A. Yes, sir.

Q. And what, if anything, occurred at that time? A. Well, he picked me up and we left for Mexico or presumably Mexico.

Q. As you began your trip, what, if anything, occurred? A. He asked me if I brought all my clothes, and I told him just my summer clothes, and he said well, we just may go and stay there. If I like Mexico, we just may stay. [722] And once again he told me that he was depressed and he was just tired of doing things for people and he was—he was just sick and tired of the whole mess and he was—if he liked it, he was going to stay.

Q. All right. Did he mention what, if anything, was going to be used to live on?

Mr. Shaw: Judge, again I'm going to object to this as being leading and suggestive.

The Court: No. She may answer.

Witness: Yes, sir. He said he had money to take care of us.

Q. (Mr. Heineman) Did he tell you how much he had?

A. [illegible]

Q. All right. What happened shortly thereafter? As you [illegible] on, then what occurred? A. Well, we drove all [illegible] came into Oklahoma and stopped for gas. [illegible] and his son Larry—he was with us—to make [illegible] what was going on, and Larry made the call. He came back to the car and said——

The Court: Don't say what he said.

Witness: Okay.

Q. (Mr. Heineman) Now, did the Defendant Mr. Crismon make any statement concerning what you were going to do in Mexico? What, if anything, you would do in Mexico? [723] A. No, sir.

Q. All right. What did he tell you, if anything, concerning how long you might stay? A. He didn't say. He just—he said we might not come back. We just might stay if he liked it.

Q. So you continued driving and what, if anything, occurred? Where did you go? A. We went from there to Austin, Texas. We arrived there around noon the next day and checked into a Ramada Inn, and Mr. Crismon told Larry again to make a call to see what was going on.

Q. Okay. How many such calls back did Larry make? A. During the trip?

Q. Yes. A. I'd say four.

Q. Four calls? A. Yes.

Q. All right. Now, did you see any evidence in the car that there was any money brought along?

Mr. Shaw: Object to this, Your Honor, as leading and suggestive.

The Court: Well, she may answer.

Witnesss: Yes, sir.

Q. (Mr. Heineman) What, if anything, did you see? [724] A. I saw a briefcase with some money in it.

Q. Do you have any idea how much money? A. No, sir, I sure don't.

Q. How was it contained? Was it cash, checks, or what was it? A. Cash.

Q. What condition was the cash in? Was it loose? A. No; it was in bundles. Four, five or six bundles.

Q. Do you recall the denominations? A. There was some twenties, I know.

Q. Bundles of twenties? A. (No response).

Q. Would you answer audibly? A. What?

Q. Would you say it out loud? A. Yes, they was—I don't know. They was one bundle of twenties, I know. I don't know what it was, I wouldn't look at it too much.

Q. After you were at Austin, Texas, what, if anything, happened after that? A. Well, they just made the phone call. Larry made the phone calls and then he suggested to his father that we not go to Mexico, that we go to San Diego, California.

[725] Q. And did you thereupon leave Austin, Texas? A. Yes, sir.

Q. And where did you go? A. To San Diego, California.

Q. And what, if anything, happened there? A. Well, we arrived there around six o'clock in the morning and we slept until around ten and then everyone got up and then we taken a ride over into Tijuana.

Q. Did the Defendant say anything to you about what he wanted to do in San Diego? A. No, sir.

Q. Did he tell you what his plans were for his money? A. No, sir, he never.

Q. Did you stay with him, Mrs. Saltz? A. Did I stay with him?

Q. Yes. A. No, sir I ran off and came back.

Q. Why did you come back? A. Because I thought I was going away—I had in my mind that we was going away and not coming back, and I didn't want to leave my children.

Mr. Heineman: One moment, Your Honor.
I have no further questions.

[726] The Court: You may inquire, Mr. Shaw.

Mr. Shaw: Do you have a Jenks Statement for this young lady?

(Whereupon, the Jenks Act statement was given to Mr. Shaw by Mr. Heineman.)

Cross-Examination

By Mr. Shaw

Q. Ma'am, as I understand it, you ran away from this trip because you were afraid you would not see your children again? A. Yes.

Q. And where are these children? A. They are in Farmington.

Q. And how old are they? A. At that time, they were eighteen, nineteen and twenty-two.

Q. They were eighteen, nineteen, twenty-two? A. And twenty-two.

Q. Three children? A. Yes, sir.

Q. And you say that you returned home because you were afraid you would not see them any more? A. Yes, sir.

* * * * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1345

JAMES B. CRISMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was found guilty on eight counts of bank and mail fraud, in violation of 18 U.S.C. 656, 1005 and 1341. He was sentenced to imprisonment for five years on Counts I and II, to run consecutively, and for five years on the remaining counts, to run concurrently to the sentence on Counts I and II, and was fined

$5,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that petitioner, president of the First State Bank of Bonne Terre, Missouri, had defrauded the bank of amounts totalling more than $277,000. Bank examiners had begun an investigation of petitioner's bank prior to August 1970. Over petitioner's objection, the trial judge admitted testimony of Mrs. June Saltz that she had been petitioner's mistress and that petitioner took her with him on a trip to Texas, California and Mexico in August 1970. Petitioner's sole contention, that this was reversible error, is without merit.

Mrs. Saltz testified that petitioner told her he had brought $50,000 cash on the trip and that he might stay in Mexico permanently (see Pet. App. B, pp. 4-7). This evidence was clearly relevant to show that petitioner contemplated fleeing during the investigation of his bank. It is settled that evidence of flight is admissible to show consciousness of guilt. See, *e.g.*, *Shorter* v. *United States*, 412 F. 2d 428 (C.A. 9), certiorari denied, 396 U.S. 970; *United States* v. *King*, 373 F. 2d 813 (C.A. 2), certiorari denied, 389 U.S. 881; *United States* v. *Waldman*, 240 F. 2d 449 (C.A. 2). Although petitioner had not at the time been charged with any crime, an offer of proof of flight does not depend on the existence of an indictment. See *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8). Mrs. Saltz's testimony that she was petitioner's mistress was relevant to establish her credibility and the foundation of her knowledge of the in-

formation to which she testified. See *Scalf* v. *Bennett*, 408 F. 2d 325, 329 (C.A. 8), and cases there cited; see also *United States* v. *Kompinski*, 373 F. 2d 429, 432 (C.A. 2). Petitioner's assertion that the prejudicial effect of his relationship with Mrs. Saltz so far outweighed its probative value as to require exclusion of the testimony was within the discretion of the trial judge (see *Scales* v. *United States*, 367 U.S. 203, 255-256), and no abuse of discretion is shown here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

ADDITIONAL QUESTION PRESENTED

Whether the verdict directing instruction for Counts I, II, III, IV and VIII was in conflict with an applicable decision of this Court.

ADDITIONAL STATEMENT

Petitioner was indicted by the Federal Grand Jury in five counts for violation of Section 656, Title 18, United

States Code. Trial upon issues resulted and Petitioner being found guilty on each of the five counts with the sentence imposed under Count II to run consecutively with the sentence imposed under Count I and Counts III, IV and VIII to run concurrently with Counts I and II for a total of ten (10) years, and Petitioner was fined Five Thousand Dollars ($5,000.00) under Count VIII.

The part of the instruction complained of appears at page 1254 of the Transcript:

> "You are instructed that if the Board of Directors approved the actions of Defendant, that is a circumstance to be considered by you in determining whether the Defendant had an intent to injure or defraud the bank. However, the most formal vote of the Board of Directors could not authorize the willful misapplication of the monies, funds or credits of a bank. The authority of the officers of the bank and of its Board of Directors extends only to legitimate transactions honestly intended for the benefit of the bank."

The instruction was objected to and a contrary instruction was offered and refused as Instruction A.

REASONS FOR GRANTING THE WRIT

The Supreme Court has decided in *United States* v. *Britton,* 108 U.S. 193, 2 S.Ct. 526 that an officer submitting his own note, even though he is insolvent, and the Board of Directors knowing the facts, order the note to be discounted, that no criminal prosecution against the bank officer will lie, and that this is not willful misapplication of funds of the bank. This is the law of the case. This was not the instruction of law to the jury.

CONCLUSION

Therefore, it is respectfully submitted that this Petition for Writ of Certiorari should be sustained.

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's original petition for a Writ of Certiorari begs the invocation of this Court's supervisory power. The United States Court of Appeals, Eighth Circuit affirmed the conviction and imprisonment of a multi-millionaire in a twenty-five word order. The transgression by the trial court requested to be reviewed is the introduction into evidence of the testimony of a witness for the United States, June Saltz. Upon a preliminary and seemingly innocuous question by the United States Attorney, Ms. Saltz testified she was defendant's mistress (Pet. App. B, A-2). She further testified to facts and statements which could be construed as contemplation of flight (Pet. App. B, A-4-8; Solicitor General's Memorandum in Opposition, 2). What

can be more prejudicial for a lay jury in a highly publicized case of a multi-millionaire country banker than he has a mistress? How unique a departure from the accepted and usual course of judicial proceedings is it to allow testimony of contemplated flight? Defendant was heinously prejudiced.

The evidence presented by either side was essentially balanced. The scales of justice could have tipped either direction. Ms. Saltz unfairly tipped the scales. The United States Court of Appeals, Eighth Circuit, reversing the District Court in *Nigro* v. *United States,* 117 F.2d 624, stated ". . . With the scales thus balanced, Monroy's testimony unquestionably was highly prejudicial."

The District Attorney's evidence concerning flight is that of contemplated flight. Contemplate indicates an expectation or intention. It is not an undertaking. *Read* v. *Fox,* 104 N.Y.S. 251, 253, 119 App.Div. 366. *Embree* v. *United States,* 320 F.2d 666 states the criterion for admissibility of flight:

> ". . . there is nothing in the record to indicate that he was informed, before his attempted flight, that he was being sought in connection with the offenses involved in this case, such flight does not constitute an admission, or other evidence, that he is guilty of those crimes."

To introduce evidence of flight—flight must be shown. Just as in *Embree* when introduction into evidence of flight not connected to the crimes defendant was being tried for was reversible error, it is Petitioner's position actual flight must be shown to introduce into evidence any evidence of flight.

The admission of irrelevant facts which have a prejudicial tendency is fatal to a conviction. Petitioner cannot believe this Court will allow a conviction to stand in a Court of the United States which is based on highly prejudicial evidence. This Court has reversed on certiorari before even though there was sufficient relevant evidence to sustain the verdict. *Hall* v. *United States,* 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003; *Williams* v. *United States,* 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509.

A Petition for a Writ of Certiorari is respectfully requested.

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